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No. 08-453

IN THE
Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C.
AND
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 4, 2009

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real estate professionals and real property owners in important matters before the legislatures, courts, and executives

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief. Counsel for respondent the Clearing House Association, L.L.C. has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and letters reflecting the consent of both petitioner and respondent Office of the Comptroller of the Currency have been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

of the federal and state governments. The issues presented in those matters include fair lending practices, equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Glenmont Hills Associates Privacy World at Glenmont Metro Centre v. Montgomery County*, 128 S. Ct. 2914 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

NAR seeks an end to discriminatory practices in mortgage lending, in order to ensure the ample availability of funds for mortgage lending, among other objectives. The livelihood of NAR's members is enhanced by lending practices that are fair, transparent, and nondiscriminatory. Such lending practices ensure that mortgages will be available to the maximum number of qualified consumers who wish to purchase homes. Home ownership is in the best interest of the country as a whole as well as to NAR, and it continues to be recognized as a favored public policy goal at both the federal and state levels. In contrast, when national banks discriminate in their mortgage lending, fewer funds are available

for home purchases. State antidiscrimination laws apply to national banks and play an important role in fighting discriminatory lending practices. These laws are most effectively enforced by the States themselves. Therefore, enforcement of state anti-discrimination laws by the States is crucial to ensuring that national banks observe fair, transparent, and nondiscriminatory lending practices. Such enforcement also ensures that they do not obtain a competitive advantage over competitors that remain subject to state enforcement actions.

NAR's interests in this case also arise from its status as a leading advocate for housing issues and its substantial and longstanding commitment to affordable housing, equal opportunity in housing, and fair housing compliance. These concerns are also acutely affected by and related to the mortgage lending issues at the core of this case. To the extent the decision below denies States the authority to enforce their fair lending statutes, the housing interests of NAR and its members may be similarly compromised. In addition, the broad scope of authority the Office of the Comptroller of the Currency ("OCC") asserts in this case has widespread implications for state enforcement of other state statutory and regulatory schemes that may be applicable to NAR's members.

SUMMARY OF ARGUMENT

This case concerns the OCC's effort to divest States of their authority to enforce against national banks and their various operating subsidiaries those state laws that the National Bank Act does *not* preempt. The OCC concedes that national banks and their operating subsidiaries must abide by such laws like the New York antidiscrimination laws at issue in this case and can be punished for violating those laws. But the OCC has promulgated a regulation, 12 C.F.R. § 7.4000, that purports to grant it the "exclusive authority" — rather than concurrent authority — to enforce such laws. There appears to be no precedent for a regime where a State's legislature has authority to pass laws that its executive cannot enforce. And nothing in the National Bank Act authorizes the OCC to create such a regime.

I. A. It has long been recognized that agencies frequently act to augment their own power and authority. Such self-interested actions should be viewed with special skepticism under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), particularly when they entail overt attempts to enhance an agency's budgetary authority and financial resources. Such financial incentives can skew the evenhanded approach Congress expects in the implementation of congressional policy.

B. The OCC's budget derives almost entirely from its assessments on banks that have chosen to be nationally chartered, rather than state chartered. As the OCC itself acknowledges, it has a strong incentive to promulgate rules that entice banks to exchange state charters for national charters. Indeed, the OCC views itself as in competition with the States. But the OCC's budgetary incentives conflict

with Congress's historical policy of competitive equality between the federal and state banking systems.

C. Section 7.4000 is part of the OCC's efforts to entice banks to adopt national charters. The practical effect of § 7.4000 is to insulate national banks from the enforcement of state laws that those national banks are bound to obey. In contrast to States, which brought more than *4,000* enforcement actions in 2003, the year before § 7.4000 took effect, the OCC has concluded only *four* enforcement actions to protect consumers from abusive practices in the past five years. Nor is the OCC equipped to monitor, understand, and enforce 50 different States' generally applicable laws, to which national banks and their operating subsidiaries are subject. The OCC's action, though consistent with its budgetary incentives, is directly contrary to Congress's "policy of competitive equality" between state-chartered and nationally chartered banks, which is "firmly embedded in the statutes governing the national banking system." *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 133 (1969). The effect on the dual-banking system, as well as the OCC's budgetary self-interest, are significant reasons to view § 7.4000 with skepticism rather than deference under *Chevron*.

D. The OCC's claim of exclusive authority to enforce state laws extends well beyond the traditional banking activities of national banks and reaches every activity that the OCC has authorized national banks and their operating subsidiaries to undertake. Thus, the OCC's rule purports to divest states of the right to enforce non-preempted laws governing such diverse activities as selling long-term health care and disability insurance, developing commercial buildings and managing residential condominiums in

those buildings, and providing Web design services. The multitude of companies that compete to provide these same services — and that are owned by state banks or no bank at all — remain subject to state enforcement actions, while their competitors owned by national banks are not. That disparity creates a further incentive for state banks to adopt national charters and for companies to become subsidiaries of national banks.

II. A. In all events, § 7.4000 is unlawful. By stripping States of the right to enforce their own laws, § 7.4000 alters the federal-state balance of power. To effect such a rebalancing of power, Congress must make its intention to do so unmistakably clear. This clear-statement requirement has additional force when a federal agency — and not Congress — seeks to alter the federal-state balance of power. Allowing a federal agency to strip States of their powers without express authorization from Congress blurs lines of political accountability.

B. The clear-statement rule is particularly important in this case, where the OCC's regulation divorces the right to enact a law from the power to enforce it. As this Court recognized long ago, the "fallacy" in such a separation is "made apparent by the mere statement of the proposition," because the State executive's power to enforce its legislature's laws "is essentially inherent in the very conception of law." *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds). Even assuming Congress could create such an unprecedented rule, Congress could not do so through implication, and federal agencies should not be assumed to have received implicitly delegated power to strip States of basic sovereign

rights. Accordingly, there is no basis in these circumstances for granting *Chevron* deference to the OCC's regulation.

C. Congress did not clearly grant the OCC the right to claim exclusive authority to enforce those state laws with which national banks and their operating subsidiaries must comply. The OCC relies on its exclusive "visitorial powers" over national banks, 12 U.S.C. §§ 481, 484(a), but those "visitorial powers" have never been understood to preclude a State from seeking "to vindicate and enforce its own law" when "the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation." *St. Louis*, 263 U.S. at 660. The OCC also relies on 12 U.S.C. § 1818(b), but Congress there gave the OCC only concurrent — not exclusive — authority to enforce state laws against national banks and their operating subsidiaries.

ARGUMENT

I. THE OCC HAS MADE A CONCERTED AND SELF-INTERESTED EFFORT TO INSULATE NATIONAL BANKS FROM STATE REGULATION

The *Chevron* question in this case stems from the OCC's decision to assert preemptive enforcement authority over concededly non-preempted state laws. In evaluating the OCC's authority, it is important to place that assertion of agency power in its proper context. Courts and commentators have recognized the tendency of federal agencies to augment their power and explained why claims of *Chevron* deference may be suspect in such circumstances. In the OCC context, that skepticism should be amplified by

the massive financial incentives under which the OCC operates.

A. Agency Claims For *Chevron* Deference Should Be Viewed With Special Skepticism When Its Actions Aggrandize Agency Power

Courts have acknowledged "the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981). Leading commentators explain that "agencies are peculiarly susceptible . . . to act in their own interests." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 447 (1987). That is especially true when those interests are financial: the "goals of the bureaucrat are most closely associated with the size of the bureau's budget." Dennis C. Mueller, *Public Choice* 156-70 (1979); *see* William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36-42 (1971).

When an "agency's self-interest is so conspicuously at stake," courts should not accord the agency's views *Chevron* deference. Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 210 (2006); *cf. Mesa Air Group, Inc. v. Department of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996) (applying "neutral principles of contract law, not the deferential principles of regulatory interpretation," to contracts between the agency and private entities); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract."). In such

cases, there is a substantial risk that "the decision to regulate may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy." Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1024 (1992); *see also* Sunstein, 101 Harv. L. Rev. at 467 ("foxes should not guard henhouses").

Those principles apply with special force in this context, because the OCC has significant budgetary incentives to lure banks to be nationally chartered and to relieve those banks of state-law liability.

B. The OCC Is Funded Almost Entirely By Banks That Choose To Obtain National Charters

Congress does not provide the OCC with annual appropriations.[3] Instead, the Comptroller has statutory authority to "impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office of the Comptroller." 12 U.S.C. § 482. The Comptroller levies a semiannual assessment on all nationally chartered banks, using a fixed fee schedule.[4] Therefore, the greater the number and size of banks with national charters, the larger the OCC's budget.[5] For fiscal year 2007, the OCC's total revenue (and, therefore, its budget) was $695.4 million, $666 million (or

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[3] *See* OCC, *Annual Report – Fiscal Year 2007*, at 70 (Nov. 2007) ("*OCC FY2007 Report*"), *available at* http://www.occ.gov/annrpt/2007AnnualReport.pdf.

[4] *See* 12 C.F.R. § 8.2(a) (highest assessment rates are paid by national banks with assets over $250 billion).

[5] *See generally* OCC, *Semiannual Assessment* (updated Dec. 1, 2008), *at* http://www.occ.gov/assess.htm.

nearly 96 percent) of which came from assessments on national banks.[6]

Because its budget depends almost entirely on assessments on national banks — and because banks have the option to operate under state or national charters[7] — the OCC has a strong incentive to promulgate rules and to operate in a manner that entices banks to obtain and maintain national charters, as opposed to state charters. The OCC views itself as engaged in competition with the States to convince banks to opt for (or to convert to) national charters rather than state charters. The Comptroller at the time the OCC promulgated the rule at issue here had stated that the potential of losing regulatory "market share" to the state banking system was "'a matter of concern to us.'"[8] As a result, he said, "the OCC has aggressively supported the preemption of state laws in order to keep national banks . . . from converting to state charters" — thereby reducing the OCC's resources — and to persuade state banks to adopt national charters.[9] As he acknowledged, the preemption of state regulatory authority "provides an incentive for banks to sign up with the OCC . . . . 'It is one

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[6] The remainder of the OCC's budget comes from investment income and bank licensing fees. *See OCC FY2007 Report* at 70 & table 9.

[7] *See* 12 U.S.C. § 24; *see also Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954).

[8] Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1 (quoting Comptroller John D. Hawke, Jr.).

[9] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 2 (Feb. 12, 2002) ("Hawke Remarks"), *reprinted in* OCC News Release 2002-10, *available at* http://www.occ.treas.gov/ftp/release/2002-10a.doc.

of the advantages of a national charter, and I'm not the least bit ashamed to promote it.'"[10]

Although the OCC has a clear incentive to regulate in a manner that makes national charters preferable to state charters, Congress has followed a "policy of equalization" designed to maintain a basic parity of competitive opportunities between national and state banks. *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). Thus, while "the Federal Government is a rival chartering authority for banks," *Franklin Nat'l Bank*, 347 U.S. at 375, Congress has long pursued a policy of preserving this nation's "dual-banking system" by seeking to ensure a competitive balance between the two systems, *see*, *e.g.*, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *see also First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 133 (1969) ("The policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system."). Regulatory efforts that disrupt that balance — like § 7.4000 — are contrary to Congress's longstanding policy goals in this area.

C. Section 7.4000 Is Part Of The OCC's Efforts To Entice State-Chartered Banks To Obtain National Charters

Since 1966, the OCC has had concurrent authority with the States to enforce state laws against national banks and their operating subsidiaries.[11] *See* Cuomo

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[10] Bravin & Beckett, *supra* note 8, at A1 (quoting Comptroller Hawke).

[11] The OCC defines an "operating subsidiary" of a national bank to include any state-chartered "corporation, limited liability company, limited partnership, or similar entity" that engages in only those "activities that are permissible for a national bank

Br. 7-9. Congress has expressly authorized the OCC to initiate cease-and-desist proceedings to remedy a violation of *any* "law, rule, or regulation," which includes violations of state laws that the National Bank Act does not preempt. 12 U.S.C. § 1818(b); *see National State Bank v. Long*, 630 F.2d 981, 988 (3d Cir. 1980) ("[t]he legislative history of the Act indicates that Congress was concerned not only with federal but with state law as well"). That is because "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the [National Bank Act]." *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1567 (2007). States "are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers." *Id.*

Pursuant to that long-recognized authority, States have routinely enforced their nondiscrimination and consumer protection laws against national banks.[12]

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to engage in directly" and that is "control[led]" by a national bank. 12 C.F.R. § 5.34(e)(1)-(2).

[12] *See*, *e.g.*, *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) ("[f]ederal law does not require that the OCC have exclusive enforcement" of state fraud and deceptive trade practices laws against "national banks and their branches"); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 526 (W. Va. 1995) ("Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the [state consumer protection act] did not include lawsuits against [national banks], these institutions could, if unsavory, run in effect a 'laundry' for 'fly-by-night' retailers that seek to excessively charge their customers."); *State v. Ameritech*, 532 N.W.2d 449, 451 (Wis. 1995) (per curiam) (affirming the naming of Household Bank, N.A. as

In 2003, the last full year before § 7.4000 went into effect — and the OCC for the first time claimed exclusive authority to enforce state laws against national banks and their operating subsidiaries — state bank supervisory agencies performed more than 20,000 investigations in response to consumer complaints about abusive lending practices, and those investigations produced more than 4,000 enforcement actions.[13]

In contrast, the OCC has initiated very few actions against national banks and their subsidiaries for infractions of the 50 States' different laws. The OCC identifies only *four* enforcement actions that it "has taken against banks engaged in abusive practices" since promulgating § 7.4000 in 2004.[14] Nor is the OCC equipped to monitor, understand, and enforce the 50 States' different laws, particularly in comparison with the 50 States' supervisory agencies and attorneys general. The OCC attorneys detailed to compliance matters nationwide number only in the "dozens."[15] Yet, on consumer issues alone, the OCC

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a defendant in a case involving advertising and marketing); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 408 (Alaska 1982) (Alaska sued a national bank in connection with its role as a financer of a real estate development — an authorized banking activity).

[13] *See Views and Estimates of the H. Comm. on Fin. Servs. on Matters To Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005*, 108th Cong. 16 (Comm. Print 2004), *available at* http://financialservices.house.gov/media/pdf/FY2005%20Views_FINAL.pdf.

[14] OCC, *Consumer Protection News: Unfair and Deceptive Practices*, *at* http://www.occ.treas.gov/consumer/unfair.htm (visited Feb. 25, 2009).

[15] Remarks by Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the

receives roughly 70,000 complaints and inquiries each year.[16] Those complaints are handled by a single office of the OCC,[17] which in 2005 had only 50 employees in total.[18] In contrast, "State banking agencies and State attorneys generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance."[19] The OCC's assignment of staff to the protection of consumers reflects an OCC policy priority: "[u]nlike consumer advocates and state attorneys general, OCC defines itself as a neutral arbiter in terms of assisting consumers."[20] Such "neutrality," however, is tantamount to neglect of consumer protection.

Currency, *Preemption and the Evolving Business of Banking*, Before the New York Bankers Ass'n Financial Services Forum at 5 (Mar. 25, 2003), *available at* http://www.occ.treas.gov/ftp/release/2004-25a.pdf.

[16] *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 140 (2007) (statement of John C. Dugan, Comptroller of the Currency), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37556.pdf.

[17] *See* Gov't Accountability Office, *OCC Consumer Assistance: Process Is Similar to That of Other Regulators but Could Be Improved by Enhanced Outreach* 2 (2006) ("*OCC Consumer Assistance*"), *available at* http://www.gao.gov/new.items/d06293.pdf.

[18] *See Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 80 (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:36821.pdf.

[19] *OCC Consumer Assistance* at 16.

[20] *Id.* at 23.

The effect — if not the intention — of § 7.4000 is to insulate national banks and their operating subsidiaries from the enforcement of applicable state laws. In proposing § 7.4000 and related regulations, the OCC touted them as part of an effort to create "a 'complete' national banking system, free from state control, and subject to uniform, national standards."[21] The Comptroller who promulgated those rules touted the "major advantage of the national charter" as the freedom "to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[22] But the only way to offer national banks such "uniform, national standards" is for the OCC to leave unenforced the varying laws of the 50 States that are not preempted and to which national banks remain subject.

At the same time, States retain authority to enforce those laws against the national banks' competitors, including state-chartered banks and the numerous commercial entities that compete with national banks' operating subsidiaries. As a former Chairman of the Federal Deposit Insurance Corporation ("FDIC") explained: "The facts of life today with regard to preemption are fairly simple. A state-chartered bank that wants to do business across state lines is at a substantial competitive disadvantage relative to a national bank."[23] That dynamic has caused the

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[21] *Bank Activities and Operations; Real Estate Lending and Appraisals*, 68 Fed. Reg. 46,119, 46,129 (Aug. 5, 2003).

[22] Hawke Remarks at 2.

[23] Remarks by Donald E. Powell, Chairman, FDIC, Before the American Bankers Association Annual Convention at 2

share of banking activity that state-chartered banks conduct to "dwindl[e]," with "every reason to believe that trend will continue."[24]

Indeed, § 7.4000 had its desired effect of promoting the OCC's efforts to market national charters to banks. In fiscal year 2005, the OCC recorded a 15-percent increase in assessment revenues.[25] The OCC attributed that revenue growth to "new large banks joining the national banking system" following the promulgation of regulations like § 7.4000.[26] Indeed, many of the largest banks publicly supported the OCC's adoption of § 7.4000[27] and then converted from state to national charters thereafter.[28]

The OCC's self-serving accretion of power through the promulgation of § 7.4000 violates "[t]he policy of competitive equality" between state-chartered and nationally chartered banks, which is "firmly embed-

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(Sept. 26, 2005), *available at* http://www.fdic.gov/news/news/speeches/archives/2005/chairman/spsept2605.html.

[24] *Id.* at 1.

[25] OCC, *Annual Report – Fiscal Year 2005*, at 62 & table 9 (Oct. 2005) (reporting that the OCC's assessment revenues rose from $482.3 million in fiscal year 2004 to $557.8 million in fiscal year 2005), *available at* http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf.

[26] *Id.* at 62.

[27] *See* Todd Davenport, *Are States, OCC Near a Preemption Showdown?*, American Banker, Nov. 5, 2003, at 1 (reporting that, "[t]o nobody's surprise, large national banking companies such as Bank of America Corp., Wells Fargo & Co., Wachovia Corp., Bank One Corp., and National City Corp. wrote long comment letters" in support of the OCC's rulemaking proposal).

[28] Laura Thompson Osuri, *Trustmark of Miss. Sticking with OCC*, American Banker, Sept. 20, 2004, at 5 (reporting that J.P. Morgan Chase, HSBC, and Harris Bank had converted from state to national charters in 2004).

ded in the statutes governing the national banking system." *Dickinson*, 396 U.S. at 133. In fact, so "firmly embedded" is "the congressional policy of competitive equality with its deference to state standards," that it is not "open to modification by the Comptroller of the Currency." *Id.* at 138. Despite the OCC's natural, perhaps even understandable, inclination to aggrandize its power and budget by enticing banks to obtain national charters, the courts must reign in the OCC's actions when, as here, they conflict with congressional policy.

D. The OCC's Attempt To Exclude State Enforcement Of State Law Is Particularly Problematic Because It Extends Well Beyond Traditional Banking Activities

The harmful effects of § 7.4000 are magnified by the OCC's expansive interpretation of the "business of banking." As this Court has held, the OCC "has discretion to authorize [national banks to undertake] activities beyond those specifically enumerated" in the National Bank Act,[29] so long as they are among the "incidental powers . . . necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). In recent years, the OCC has read the "incidental powers" language extremely broadly and thereby expanded its regulatory reach into areas that, at best, are only tangentially related to the business of banking.

For example, the OCC has concluded that national banks' "incidental powers" extend to providing coun-

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[29] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

seling to Medicare and Medicaid recipients,[30] selling long-term care and disability insurance,[31] operating roadside assistance programs,[32] finding customers for automobile sales,[33] developing commercial buildings and managing residential condominiums in those buildings,[34] dispensing various prepaid products, such as public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, and promotional and advertising materials, through their ATM machines,[35] operating a "virtual mall" where bank customers "can shop for a range of financial and non-financial products and services,"[36] and providing "Web design and development services."[37] The OCC has also authorized national banks and their operating subsidiaries to engage in all forms of real estate lending. *See* 12 C.F.R. Pt. 34.[38]

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[30] OCC, *Activities Permissible for a National Bank, 2007*, at 5 (June 2008), *available at* http//:www.occ.treas.gov/corpapps/BankAct.pdf.

[31] *Id.* at 6.

[32] *Id.* at 16.

[33] *Id.*

[34] *Id.* at 67-68.

[35] *Id.* at 52.

[36] *Id.* at 56.

[37] *Id.*

[38] Of keen concern to NAR, of course, is, as Justice Stevens suggested in *Watters*, that "[t]he Comptroller may well have the authority to decide whether the activities of a mortgage broker, *a real estate broker*, or a travel agent should be characterized as 'incidental' to banking, and to approve a bank's entry into those businesses." 127 S. Ct. at 1583 (Stevens, J., dissenting) (emphasis added).

Numerous companies compete to provide all of these services, and the vast majority are *not* owned by national banks. Although state antidiscrimination laws apply to all of these competing companies, under § 7.4000 only the OCC can enforce those state laws against companies owned by national banks. Such freedom from state enforcement is likely to mean, as a practical matter, that national banks and their operating subsidiaries will be free from *any* effective enforcement of those laws, given significant competing demands on the OCC's attention, resources, and, indeed, enforcement skills with respect to such a wide range of activities governed by various States' laws. Therefore, companies owned by national banks are placed at a significant advantage over companies owned by state banks — or owned by no bank at all — even though all of these companies are in direct competition with each other. The resulting incentives for state banks to become national banks — and for independent companies to be acquired by national banks — threaten both to impair the dual-banking system and to prejudice the interests of consumers and other parties that state laws are designed to protect.

II. CONGRESS DID NOT STRIP STATES OF THEIR SOVEREIGN RIGHT TO ENFORCE NON-PREEMPTED STATE LAWS AGAINST NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES, NOR DID IT GRANT THE OCC THE AUTHORITY TO DO SO

A. Absent An Express Authorization From Congress, Administrative Agencies Cannot Strip States Of Their Sovereign Rights

This Court's cases make clear that, when Congress seeks to alter the federal-state balance of power,

Congress must "make its intention . . . unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted); *see United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

This clear-statement requirement is especially pronounced when a federal agency — and not Congress — is altering the basic allocation of authority between the federal and state governments. As this Court has explained, "where [an] administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," the Court's "concern" for a clear statement from Congress "is heightened." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

That heightened concern applies here, where the OCC promulgated a regulation that purports to divest States of their sovereign authority to enforce generally applicable state laws against national banks and their operating subsidiaries. The OCC concedes, as it must, that national banks and their operating subsidiaries are subject to those state laws.[39] The laws in question are not preempted and, in particular, do not conflict with any federal law or policy.[40] Instead, the OCC claims that it alone —

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[39] *See* OCC C.A. Br. 37 (May 30, 2006).

[40] Accordingly, this case is very different from *Watters*, where the Court found that "the State's regulations [at issue] must give way" because those "state prescriptions significantly impair[ed] the exercise of [a national bank's] authority" under the National Bank Act. 127 S. Ct. at 1567. Therefore, neither

and not state attorneys general — can enforce against national banks and their operating subsidiaries those generally applicable laws that state legislatures retain authority to enact and that national banks and their subsidiaries must obey.

Allowing a federal agency to alter the federal-state balance without express authorization from Congress also blurs lines of political accountability, in contravention of this Court's other federalism precedents. *See*, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) ("[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.") (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

B. The Clear-Statement Rule Applies With Additional Force, In Light Of The OCC's Unprecedented Effort To Divorce State Legislative Power From State Enforcement Authority

A State's authority to enforce its own laws is an inherent sovereign power and a quintessential function of the State. As this Court held long ago: "To demonstrate the binding quality of a statute, but deny the power of enforcement[,] involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *First Nat'l Bank in St. Louis v.*

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the OCC nor the State could enforce the regulations at issue in *Watters* against the national bank's operating subsidiary.

Missouri, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds); *see* Cuomo Br. 30-31.

Indeed, this Court has long held that States have the sovereign authority "to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 U.S. 313, 320 (1978); *see Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("[T]he power to create and enforce a legal code, both civil and criminal[,] is one of the quintessential functions of a State.") (internal quotation marks omitted). These two powers — the power to create law and the power to enforce that law — are interdependent, for "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Therefore, because "the sanction behind [state law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *St. Louis*, 263 U.S. at 660. Notably, neither the OCC nor the court below identified any other instance in which Congress has allowed States to pass laws that they may not enforce.

Even assuming Congress has authority to preempt state enforcement of state laws, rather than state laws themselves, it follows that Congress must speak expressly to alter the federal-state balance of power in so unusual a way. Congress cannot do so through implication, and federal agencies should not be assumed to have received implicit delegations of power to strip States of their enforcement authority.

Accordingly, there is no basis in these circumstances for granting *Chevron* deference to the OCC's claim that the National Bank Act grants it such power. A fundamental prerequisite for the application of *Chevron* deference — the implicit delegation

of authority to agencies to fill in statutory gaps — is absent in this context. *See*, *e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); *id.* at 133 (recognizing that the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such . . . political magnitude to an administrative agency"); *cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

C. Congress Did Not Expressly Divest States Of Authority To Enforce Non-Preempted State Law, Nor Did It Expressly Delegate To The OCC The Power To Do So

Although the court below appears to acknowledge that the clear-statement rule applies when Congress seeks to alter "an intrinsic aspect of state sovereignty," Pet. App. 11a, it never identified any such statement from Congress, and there is none. The OCC has pointed to two statutory provisions that it claims provide it the power to strip States of authority to enforce the laws that they retain the authority to enact. Neither contains the type of express statement that would be necessary to withdraw from States the "power of enforcement" that is "essentially inherent" in their authority to enact laws that apply to national banks and their operating subsidiaries. *St. Louis*, 263 U.S. at 660.[41]

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[41] The OCC also makes reference to its general rulemaking authority as the source of its power to restrict States from

The OCC (as did the court below) first relies on National Bank Act provisions granting the Comptroller "visitorial powers" over national banks. 12 U.S.C. §§ 481, 484(a); *see* Pet. App. 10a-32a. The term "visitorial powers" cannot be stretched to provide the necessary express statement of congressional intent to negate States' enforcement powers of their non-preempted laws. "Few ideas were more familiar in the formative era of the common law than that of visitation." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 369 (1936). When Congress enacted the National Bank Act in 1864 and included the clause on "visitorial powers," *see* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116, it incorporated the common-law meaning of that term.[42]

As this Court has held, under the common law, "visitorial powers" means that "the United States alone may inquire . . . whether a national bank is

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enforcing non-preempted state law. *See* 12 U.S.C. § 93a ("the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"). General rulemaking authority may mean that an agency receives *Chevron* deference for regulations that fall within its rulemaking authority, but it does not mean that Congress implicitly delegated to the agency the authority to pass any rule on any subject it wishes. Congress has not expressly authorized the OCC to strip States of enforcement authority over valid state laws, and therefore the mere fact that the OCC has rulemaking authority does not mean that it has authority to promulgate a rule doing so.

[42] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks and ellipses omitted).

acting in excess of its charter powers, and . . . the state is wholly without authority to do so." *St. Louis*, 263 U.S. at 660; *see also Watters*, 127 S. Ct. at 1568-69. Numerous federal courts have confirmed that the OCC's "visitorial powers" do not preclude the authority of state officials to enforce non-preempted state laws against national banks.[43]

Accordingly, when a State brings an enforcement action against a national bank for violations of valid, generally applicable, and non-preempted state anti-discrimination or consumer protection laws, it is not exercising "visitorial powers" over that bank. This Court, in unmistakably clear terms, has explained that, when a State brings such an enforcement action, it is not "endeavoring to call the bank to account for an act in excess of its charter powers"; instead, it is seeking "to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation." *St. Louis*, 263 U.S. at 660.[44] Congress's use of the

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[43] *E.g.*, *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71, 74-75 (5th Cir. 1965) (upholding a state banking superintendent's authority to bring suit for injunctive relief); *Nuesse v. Camp*, 385 F.2d 694, 699-705 (D.C. Cir. 1967) (same); *Fleet Mortgage*, 158 F. Supp. 2d at 966 ("[f]ederal law does not require that the OCC have exclusive enforcement" of state laws prohibiting fraud and deceptive trade practices against "national banks and their branches").

[44] The General Accounting Office (now the Government Accountability Office) ("GAO") similarly recognized the distinction between a "law enforcement" agency "focused on conducting investigations in response to consumer complaints and other information" and a "supervisory" officer like the Comptroller performing "routine monitoring and examination responsibilities." GAO, *Consumer Protection: Federal and State Agencies*

phrase "visitorial powers," therefore, cannot be interpreted to reflect an intent to divest States of their inherent, sovereign authority to enforce the laws they have the power to enact against those parties that are subject to — and violate — those laws. *See* Cuomo Br. 19-32.

The OCC also relies on 12 U.S.C. § 1818, which authorizes the OCC to initiate cease-and-desist proceedings to remedy a violation of any "law, rule, or regulation." 12 U.S.C. § 1818(b). Section 1818(b) certainly is broad enough to grant the OCC concurrent authority to take enforcement actions when a national bank or an operating subsidiary violates an applicable state law. But § 1818(b) does not take the next step and grant the OCC *exclusive* authority to enforce those state laws, thereby precluding the progenitor of the law from enforcing it. That section does not mention state enforcement actions, nor does it contain any term that would qualify as the clear statement required to displace state executive authority. *See* Cuomo Br. 7-9.

In sum, no provision of the National Bank Act clearly authorizes the OCC's unprecedented encroachment on the authority of a State's executive to enforce the non-preempted laws that its legislature has authority to enact. *See* Cuomo Br. 43-47. The OCC therefore impermissibly promulgated § 7.4000 to insulate national banks and their operating subsidiaries — which may engage in numerous activities beyond the traditional business of banking — from state enforcement of generally applicable state laws, no different from the state banks and other companies with which they compete. Reversing the deci-

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Face Challenges in Combating Predatory Lending 53 (2004), *available at* http://www.gao.gov/new.items/d04280.pdf.

sion below would help to restore Congress's policy of competitive equality between the national and state banking systems.

CONCLUSION

The judgment of the court of appeals should be reversed.

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March 4, 2009